CHOOI SIEW CHEONG

v.

LUCKY HEIGHT DEVELOPMENT SDN. BHD. & ANOR.

HIGH COURT MALAYA, SEREMBAN
TUAN T. SELVENTHIRANATHAN JC
[O.S. 24-473-90]
15 SEPTEMBER 1993

LAND LAW: Landowner entering into joint-venture agreement with developer to develop land - Developer assigning all rights and liabilities to 1st defendant - Landowner assigning all rights to plaintiff - Plaintiff made a permanent director of 1st defendant - 1st defendant holding developer's lots in trust for plaintiff until discharge of obligations under agreement - 1st defendant in breach of agreement to develop land - Plaintiff seeking order to re-transfer developer's lots to himself - 2nd defendant's prohibitory order preventing plaintiff from obtaining re-transfer of lots - 2nd defendant judgment creditor to 1st defendant - Whether 2nd defendant had an interest in the land - Whether 2nd defendant entitled to obtain a prohibitory order - Section 334 NLC 1965 - Whether joint-venture agreement between landowner and developer in nature of a partnership - Section 26, Partnership Act 1961 - Whether plaintiff as partner and permanent director of 1st defendant responsible for debts of 1st defendant.

This was an application by the plaintiff for *inter alia* declarations that the plaintiff was the lawful owner of specified lots of land in the Mukim of Seremban and that the 1st and 2nd defendants did not have any interest in the specified lots.

The plaintiff's father, the landowner, and a developer entered into a joint-venture agreement (the agreement) to develop a piece of land into a housing estate. By a deed of assignment the developer assigned all his rights and liabilities under the agreement to the 1st defendant and by an agreement dated 1 July 1985 the landowner assigned all his rights to the plaintiff. The 1985 agreement *inter alia* provided for the landowner to transfer in favour of the 1st defendant the developer's lots and for the plaintiff to be made a permanent director of the 1st defendant. The 1st defendant was also deemed to hold all the developer's lots in trust for the plaintiff until the completion and discharge of all the 1st defendant's obligations under the agreement. In the event the 1st defendant failed or was unable to carry on with the housing development , the 1st defendant was required to re-transfer all the developer's lots to the plaintiff.

The plaintiff contended that the 1st defendant was in breach of the agreement to develop the land as a result of which the 1st defendant was obliged to re-transfer the developer's lots to him but the land could not be re-transferred to him because of a prohibitory order registered by the 2nd defendant in respect of the land. The 2nd defendant contended that the joint-venture agreement was in the nature of a partnership and the plaintiff in his capacity as a partner in the joint-venture agreement and a permanent director of the 1st defendant could not deny the liability of the 1st defendant towards the 2nd defendant. Furthermore, it was averred that the 2nd defendant had a right to enter the prohibitory order in respect of the land as it was registered in the name of the 1st defendant, a judgment debtor of the 2nd defendant in respect of building works carried out on the land by the 2nd defendant.

Held:

[1] The 2nd defendant was entitled to object to the reliefs claimed by the plaintiff as it had obtained judgment against the 1st defendant in earlier proceedings. The land in respect of which the building works had been carried out by the 2nd defendant was registered in the name of the 1st defendant and the 2nd defendant had obtained an order of Court for the land to be sold in execution proceedings but as there were no bidders the sale was aborted.

[2] As far as the plaintiff was concerned he was not only a partner in the joint-venture agreement but was also a permanent director of the 1st defendant. It was clearly envisaged that he would play an active role in the affairs of the 1st defendant in relation to the development

of the housing estate. In these circumstances the plaintiff could not be heard to say that the building contract between the 1st and 2nd defendants was a matter which did not involve him.

[3] In the circumstances, the 2nd defendant was entitled to obtain the prohibitory order and the plaintiff could not seek the re-transfer of the land without first satisfying the judgment sum.

[Plaintiff's application dismissed with costs].

Legislation referred to:
National Land Code 1965, s. 334
Partnership Act 1961, s. 26

For the plaintiff - Choo Yem Kuen; M/s. BH Gan & Co.
For the defendant - T. Suresh; M/s. Gill and Tang

JUDGMENT

T. Selventhiranathan JC:
This was an application by the plaintiff, Chooi Siew Cheong, for the following reliefs against the first and second defendants, Lucky Height Development Sdn. Bhd. and Ong You Seng Machine Joinery Works Sdn. Bhd., respectively:

(a) a declaration that the plaintiff is the lawful owner of thirteen specified lots of land ("the specified lots") in the Mukim of Seremban.
(b) a declaration that the first and second defendants do not have any interest in the specified lots;
(c) an order to change or alter ("untuk mengubah") the prohibitory order dated 10 August 1990 in respect of the specified lots; and
(d) an order that the first defendant or the assistant registrar of the Court transfer the ownership of the specified lots to the plaintiff as the lawful owner.

The background to this application is that on 21 December 1976 one Chooi Tai Fun, the father of the plaintiff, and one Lim Cheng Kwui entered into a joint-venture agreement ("the agreement "or "the joint-venture agreement") to develop a piece of land comprising some sixty-one acres into a housing estate. Chooi Tai Fun was the registered owner of the land ("the landowner") and Lim Cheng Kwui was the developer. Under the agreement, the developer was to apply for the conversion of the land into the proper category of land use as well as for the subdivision of the land leading to the issue of separate titles in accordance with the layout plan for the construction of a certain number of houses and shophouses ("the houses") in two phases. The landowner was to contribute the land as his share of the capital contribution under the agreement and the developer was to contribute towards the entire cost of erecting the houses to be erected thereon together with possession thereof was to be shared in the ratio of 17:83 in the first phase and 23:77 in the second phase, both ratios being in the developer's favour, and the houses to be shared in the ratio provided were to be selected by the developer. Clause 4 of the agreement provided for the developer to apply for subdivision and conversion of the land forthwith or not later than two months of the execution of the agreement and to undertake to obtain all necessary approvals within twenty-four months of the execution thereof ("the application period"), with a provision for the application period to be extended for a further six months after which, if the developer still failed to obtain the requisite approval for subdivision and conversion, the agreement was to be automatically deemed null and void and neither party was to have any claim whatsoever against the other thereafter save as otherwise provided in the agreement.

Clauses 5, 6 and 7 of the agreement provided for the period within which the houses were to be completed by the developer and for the rectification of building defects, if any. Clause 7(c) provided for the parties to select their respective lots ('the developer's lots'' and "the landowner's lots'') upon the approval of the layout plan being obtained.

By clause 8 of the agreement, the landowner agreed that pending approval of conversion and of the layout plan, the developer had the full right and liberty to plan, the developer had the full right and liberty to accept bookings and enter into sale agreements with intending purchasers in respect of the developer's lots. This clause also provided for the sale agreements to be executed by the landowner and for all monies paid or payable by purchasers on account of the purchase price in respect of the developer's lots to absolutely belong and be payable directly to the developer who would not have to account to the landowner for all such monies received or receivable.

Clause 15 of the agreement provided for the developer to pay a penalty of one hundred and fifty ringgit (RM150.00) per month per unit to the landowner in respect of the landowner's lots for every month the delay in completion occurred beyond the stipulated period. Clauses 16 and 18 of the agreement provided:

> 16. Notwithstanding any other provisions herein contained to the contrary the parties hereto expressly declare and agree as follows:
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> (i) The developer shall be entitled to specific performance of this agreement if the landowner for any reason fails to carry out his obligations on his part to be fulfilled.
>
> (ii) The developer shall be entitled to assign or sublet this contract or any part thereof to a private limited company to be formed in due course to undertake the development of the said land **and shall be entitled to make any subcontract with any person or persons for the execution of any portion of the construction works**
> (emphasis added)
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> (vi) In the event that the developer shall for any reason fail or neglect to carry out or be incapable of carrying out the said houses to completion then in such a case the landowner shall at his option have the full right and liberty to engage a contractor to complete the project in its place.
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> 17. ...
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> 18. The developer is in the process of forming a private limited company and it is hereby mutually agreed (that) upon the formation of the said company the developer shall be entitled to assign the right and interest of the developer in this agreement subject to all the obligations and liabilities therein to the said company.

By a deed of assignment dated 12 June 1978, the developer assigned all his interests, rights and duties and benefits and liabilities, accrued or to be accrued under the agreement absolutely to the assignee, the first defendant. The landowner acknowledged having received due notice of the assignment.

By an agreement dated 1 July 1985, ("the 1985 agreement") entered into between the first defendant, the landowner and the plaintiff, the landowner assigned all his rights, interests, benefits and title accrued and accruing under the agreement (and supplementary agreements which are not directly relevant for the present purposes) to the plaintiff. Clause 1 of the 1985 agreement provided for the landowner to convey and transfer in favour of the first defendant the first defendant's entitlement of the second phase of the housing estate, i.e. the developer's lots.

Clause 6 of the 1985 agreement provided for the plaintiff to be made a permanent director of the first defendant and for the first defendant to indemnify the plaintiff against any liability of the first defendant or its directors "occasioned **prior** to the appointment of (the plaintiff) as permanent director" (emphasis added). By clause 7 of the 1985 agreement, the plaintiff was also made a mandatory signatory of all bank accounts operated by the first defendant in connection with its development of the housing estate with a proviso that the plaintiff should not without valid reason refuse to sign the necessary cheques or cause any inconvenience or impediment to the development as long as the vouchers for payment as authorised by the other two signatories of the bank accounts showed proper and necessary items of expenditure in connection with the development.

a By clause 12 of the 1985 agreement, the first defendant was deemed to hold all the developer's lots in trust for the plaintiff until the completion and discharge of all the first defendant's obligations to the plaintiff to be performed under the agreement, including the completion of the landowner's lots, "subject always to the express conditions contained herein". This clause also provided that in the event the first defendant failed or was unable to carry on with the housing development or abandoned it without discharging its obligations, the first defendant "shall be required to transfer all (the developer's lots) to (the plaintiff) and (the plaintiff) shall b be entitled to take over the said housing development upon such terms as he shall deem fit ...".

By clause 13 of the 1985 agreement, the plaintiff agreed to allow the first defendant to charge the developer's lots to a bank or financial institution for the purpose of obtaining finance for the development of the second phase of the housing estate "upon the usual and several undertakings and guarantees of (the first defendant) and its directors".

c In an affidavit filed in support of his application, the plaintiff averred that the first defendant was in breach of the conditions of the agreement to develop the land and build houses thereon. By reason of the breach, the first defendant was obliged to re-transfer the land to him under clause 12 of the 1985 agreement. However, the second defendant had registered a prohibitory order in respect of the land. The land could not be re-transferred to him because of the prohibitory order. The first defendant was indebted to the second defendant for goods sold and d delivered and for works carried out by the second defendant for the first defendant but the second defendant had no right or interest in the land. For these reasons he asked the Court to decide that the second defendant had no interest in the land which was subject to the prohibitory order.

In an affidavit in reply filed on behalf of the second defendant by one Ong You Seng, the manager of the second defendant, the latter stated that the second defendant had obtained e judgment against the first defendant for a sum of RM136,631.50 in respect of building works carried out on the land for the first defendant. That judgment sum remained unsatisfied. He further averred that a search carried out in respect of the land showed that the ownership of all the lots comprising the land had been transferred by the landowner to the first defendant and the first defendant was the registered owner thereof. As the first defendant was still owing the judgment sum to the second defendant, the latter, as the judgment-creditor, had obtained a prohibitory order in respect of the land to maintain the *status quo*. That prohibitory order f had been extended from time to time.

Ong You Seng further deponed that if the first defendant, had breached the agreement made between it and the plaintiff as claimed by the latter, this had no connection whatsoever with the second defendant. The latter had carried out the building works on the land and the first defendant was justly indebted to the second defendant. The second defendant had no knowledge of any agreement entered into between the plaintiff and the first defendant.

g It was contended on behalf of the second defendant that it had a right to obtain the prohibitory order under s. 334 of the National Land Code 1965 in respect of the land which was registered in the name of the first defendant as the latter was a judgment-debtor pursuant to the judgment which had been obtained against it. If the prohibitory order was set aside, the security which the second defendant held in respect of the land as a result of the prohibitory order would be lost and the second defendant would not be able to recover the judgment sum. h It was also contended on behalf of the second defendant that the joint-venture agreement entered into between the landowner and the developer was in the nature of a partnership and that pursuant to s. 26 of the Partnership Act 1961, all debts and liabilities of the partnership had to be borne by the partners. The plaintiff in his capacity as a partner in the joint-venture agreement could not deny the liability of the first defendant towards the second defendant. In addition thereto the plaintiff was involved in the affairs of the first defendant as a permanent director.

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Ong You Seng further averred that the second defendant had a right to enter the prohibitory order in respect of the land as it was registered in the name of the first defendant which was a judgment-debtor of the second defendant. The plaintiff as a partner of the first defendant in the joint-venture agreement was responsible for the debts of the partnership especially so when he was a permanent director of the first defendant as well.

The first defendant, which was under receivership, did not participate in these proceedings. However, the second defendant objected to the reliefs claimed by the plaintiff. In my view, the second defendant was entitled to do so as it had obtained judgment against the first defendant in earlier proceedings. The land in respect of which the building works had been carried out by the second defendant was registered in the name of the first defendant and the second defendant had obtained an order of the Court for the land to be sold in execution proceedings. However, as there were no bidders, the sale had to be aborted.

As far as the plaintiff was concerned, he was not only a partner in the joint-venture agreement but he was also a permanent director of the first defendant. It was clearly envisaged that he would play an active role in the affairs of the first defendant in relation to the development of the housing estate. Clause 6 of the 1985 agreement only insisted for the indemnification of the plaintiff in respect of any liability incurred by the first defendant or its directors **prior** to his appointment as a permanent director of the first defendant (emphasis added). This clearly showed that he was to actively participate in the affairs of the first defendant once he was appointed a permanent director. In his personal capacity he was a partner in the joint-venture agreement and that agreement under clause 16 (ii) provided in clear terms for the first defendant to be **"entitled to make any sub-contract with any person or persons for the execution of any portion of the construction works"** on the land (emphasis added).

In these circumstances the plaintiff could not be heard to say that the building contract between the first and second defendants was a matter which did not involve him. Under the joint-venture agreement, the landowner had authorised the developer to obtain bridging finance from banks and other financial institutions for the purpose of the housing development by charging the land but on condition that the landowner or his nominee was to be one of the signatories for cheques drawn on the banks or financial institutions providing the bridging finance.

In my view, the second defendant was entitled to obtain the prohibitory order in the circumstances and the plaintiff could not seek the re-transfer of the land to him without first satisfying the judgment sum. Having so considered the matter, I dismissed the plaintiff's application with costs.